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Supreme Court of the United States

October Term, 1942.

No. 339

CITY OF NEW ROCHELLE,

Petitioner,

AGAINST

WESTCHESTER ELECTRIC RAILROAD COMPANY and NEW ROCHELLE RAILWAY AND TRANSIT COMPANY,

Respondents.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

ALFRED T. DAVISON,
Counsel for Respondent,
The Westchester Electric Railroad Company.

INDEX.

Subject Index.

	PAGE
Statement	1
Objections to Jurisdiction	2
Statement of Facts	3
As to the Alleged Reasons Relied on for Issuance of a Writ	6
Summary of Argument	8
Argument	10
POINT I.—No Federal question was raised or decided in this action in the Courts of the State of New York and, therefore, there is no basis for invoking the jurisdiction of this Court under §237 of the Judicial Code	10
POINT II.—Even if the Courts below had decided a Federal question as claimed by petitioner herein, such determination was in accord with applicable decisions of this Court and, therefore, the claim of a Federal question is without substance	14
POINT III.—Answering petitioner's Point I. No question of due process is available to petitioner	16
POINT IV.—Answering petitioner's Point II. The construction of the franchises is a common law question for determination by the state court which cannot be presented to, or relied upon in, this Court on this application	18

PAGE

POINT V.—Answering petitioner's Point III. The decision of the Supreme Court of the State of New York is in accord with the applicable decisions of this Court 19

CONCLUSION 19

Cases Cited

American Railway Express Company v. Kentucky, 273 U. S. 269, 273 18

Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission, 309 U. S. 30, 32 18

Blair v. Chicago, 201 U. S. 400 ..... 7, 15, 16

Bonner v. Gorman, 213 U. S. 86 18

Bowe v. Scott, 233 U. S. 658, 665 13

City of Owensboro v. Cumberland Telephone & Telegraph Co., 230 U. S. 58 ..... 8, 15

Consolidated Turnpike Company v. Norfolk &c. Ry. Co., 228 U. S. 596, 600 16

Consolidated Turnpike Company v. Norfolk &c. Ry. Co., 228 U. S. 326, 331 13

Covington v. South Covington & Cincinnati Street Railway Company, 246 U. S. 413 15

Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368, 395 8

Equitable Life Assurance Society v. Brown, 187 U. S. 308, 311, 314 16

Erie Railroad Co. v. Tompkins, 304 U. S. 64 7

Louisville v. Cumberland Telephone & Telegraph Company, 224 U. S. 649 14

Lynch v. New York, 293 U. S. 52, 54 10

PAGE

McGoldrick v. Gulf Oil Corp., 309 U. S. 2 13

New Orleans Gas Light Company v. Drainage Commission, 197 U. S. 453 ..... 8, 15, 16

Northern Ohio Traction & Light Company v. Ohio, 245 U. S. 574 15

Ohio Public Service Company v. Ohio, *ex rel.* Fritz, 275 U. S. 12 15

Old Colony Trust Company v. Omaha, 230 U. S. 100, 116 ..... 7, 15

People v. O'Brien, 111 N. Y. 1 ..... 8, 14, 15

Tracy v. Ginzberg, 205 U. S. 170 18

Other Authorities Cited.

Constitution of the State of New York, Art. 1, Sec. 6 and Sec. 7 13

Supreme Court of the United States

OCTOBER TERM—1942.

CITY OF NEW ROCHELLE, *Petitioner,* AGAINST WESTCHESTER ELECTRIC RAILROAD COMPANY and NEW ROCHELLE RAILWAY AND TRANSIT COMPANY, *Respondents.*	No. .....

Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

Statement.

The petition is for review on writ of certiorari of the decision of the court of last resort of the State of New York, whereby petitioner's "complant, in so far as it seeks an injunction restraining the operation of the defendant The Westchester Electric Railroad Company's 'A' line, be, and the same is hereby dismissed, without prejudice to another action with respect to the portions of the said 'A' line on Main Street and Huguenot Street between Center Avenue and North Avenue, and on Bridge Street between Huguenot Street and Railroad Place" (R. 90).

Objections to Jurisdiction.

Pursuant to Rule 7, Paragraph 3 of this Court, respondent objects to the entertaining of this application on the following grounds:

I.

Failure to comply with Rule 38, Paragraph 2, requiring that the petition shall contain "a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question" in that as required by the reference to Rule 12 (contained in said Paragraph 2, Rule 38), there is no "statement of the grounds upon which it is contended the questions involved are substantial"; nor is there any specification of "the stage in the proceedings in the Court of first instance, and in the appellate court, at which, and the manner in which", any so-called "federal questions sought to be reviewed were raised"; nor is there any specification of "the method of raising them"; nor is there any specification of "the way in which they were passed upon by the Court"; nor are there any "pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears".

(The above quotations are of applicable portions of the rules.)

In Rule 12 it is provided:

> "The provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari. See Rule 38, Paragraph 2."

II.

If the three paragraphs numbered 1, 2 and 3 on page 6 of the petition, under the heading "Reasons Relied on for Issuance of the Writ", can be considered compliance with the requirement in Paragraph 2 of Rule 38, that the petition shall contain the "questions presented", then the questions so stated do not present any federal question.

In support of this specification see pages 6 and 7 *infra*.

Rule 38, Paragraph 2 provides:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

III.

Although the brief in support of the petition for writ of certiorari claims jurisdiction on the ground that this is a case (p. 9 of Petitioner's Brief)

> "where any title, right, privilege or immunity is specifically set up or claimed by either party under the Constitution of the United States."

no such title, right, privilege or immunity was set up or claimed in any Court below, and the record shows that no federal question was ever raised or decided in any Court below.

In support of this specification of lack of jurisdiction, see Point I, *infra*.

Statement of Facts.

The statement of facts contained in the petition does not contain certain material facts which are necessary. For that reason, we supplement the statement contained in the petition with the following facts.

New Rochelle Railway and Transit Company, named as a respondent, was not, and could not be, served with process herein; it could not be so served because, as the record shows (R. 14, 55, 169), and as the Court found (R. 82), New Rochelle Railway and Transit Company was merged into The Westchester Electric Railroad Company on June 2, 1893, by the filing of certificate of surrender of capital stock (Finding of Fact 9, R. 82) and, therefore, since that date has had no existence separate and apart from The Westchester Electric Railroad Company.

Therefore, when reference is made herein to respondent, such reference is to The Westchester Electric Railroad Company.

Respondent operates its main street railway line, known as the New Rochelle Subway Line or "A" Line, between the southerly terminus thereof, which is at the northerly end of the subway in New York City on White Plains Road at 242nd Street, and the northerly terminus of said "A" Line, which is at or near the station of the New York, New Haven and Hartford Railroad Company, in the City of New Rochelle, the intervening operation between such termini being through the City of Mount Vernon, the Villages of Pelham and Pelham Manor and in the City of New Rochelle (Map, Defendant's Exhibit AA, R. 175, 287).

The line carries upwards of 3,500 passengers daily (R. 180).

The portion of the route of this line within the City of New Rochelle is over streets covered by franchises granted to respondent and its predecessor companies, New Rochelle Street Horse Railroad Company, New Rochelle & Pelham Railway Company, and New Rochelle Railway and Transit Company (R. 85) in 1886 and subsequent years. By surrenders of capital stock, the above mentioned predecessor companies were merged into re-

spondent under the Railroad Law of the State of New York (R. 82).

The above mentioned franchises were unlimited as to time or duration (R. 82, 94).

This action by petitioner was predicated on the refusal of respondent to comply with the resolution adopted by the Common Council of petitioner on March 6, 1939, which resolution, claiming that because no dates of maturity were specified in respondent's franchises such respondent's franchises could be terminated at will, purported to terminate the above mentioned franchises and directed respondent to cease the operation of its "A" Line over streets in the City of New Rochelle (Exhibit 3, annexed to Complaint, R. 39, *et seq.*).

Respondent did not cease to operate such "A" Line in the City of New Rochelle and this action was instituted by petitioner, and in its complaint petitioner prayed for judgment declaring the rights of the parties under the above mentioned franchises, and for an "order" (*sic*) restraining respondent from continuing its operation of the "A" Line in the City of New Rochelle (R. 25, 26).

In the petitioner's complaint, there are certain allegations, denied by respondent, of non-user and of violation of franchise obligations and of operating on certain streets without a franchise, but the Courts below have found against petitioner on these claims (R. 85-87) and no claim is made on this application for review thereof.

The Trial Court found and decided that respondent's franchises, being unlimited as to time and duration, could not be terminated or taken by petitioner without compensation, and that said franchises were not terminated by the aforesaid resolution of the Common Council of petitioner, on which this action is predicated, and that respondent had the right to continue the operation of its "A" Line (R. 86-88).

Accordingly judgment was entered as stated at the outset of this brief (R. 89-90).

As to the Alleged Reasons Relied on for Issuance of a Writ.

The first reason marked "A" on page 6 of the petition has no substance because it is predicated on the statement that it is for this Court alone to determine the three so-called questions set forth on page 6, not one of which presents a Federal question or makes any reference to any right claimed under the United States Constitution.

The first so-called question under A (p. 6 of petition) would call for a determination by this Court of whether a franchise which is without limit as to time or duration is perpetual, and not a determination of whether a municipality which has granted a franchise which the Court construes to be perpetual has the right under the Constitution of the United States to terminate such franchise.

Nowhere in this first so-called question is there a claim of a right under the Constitution.

Furthermore, petitioner makes no claim that if a municipality grants a franchise which by its express terms is perpetual such municipality would have the right to terminate such franchise at will; inasmuch as the State Courts have in this case construed these franchises to be perpetual, it follows that the only question which petitioner is seeking to propound in this Court is concerning the construction of the franchises and not the right to terminate them.

The second so-called question under A (p. 6 of petition) would call for a determination by this Court of whether a certain act by a municipality is *ultra vires,* and this is not a Federal question nor does it involve a determination of any right claimed under the Constitution of the United States.

Old Colony Trust Co. v. *Omaha,* 230 U. S. 100, 116.

It is to be noted in passing that a franchise to a public utility is not parting with "the use of public streets" "permanently" "in favor of private interests".

The third so-called question under A (p. 6 of petition) is predicated upon facts which the State Courts have in this action refused to find, that is to say, the State Courts refused to find that "the continued operation under the consent is a hazard and constitutes a peril and danger to persons and property", as is stated as a premise in this third so-called question.

See proposed Finding of Fact numbered 14 (R. 76-78) and proposed Conclusion of Law numbered 5 (R. 79) contained in the proposed Findings of Fact and Conclusions of Law (R. 73-80) presented by petitioner and which the Trial Court refused to find or sign.

Furthermore, the Findings of Fact and Conclusions of Law which the Court did sign (R. 80-88) absolutely omit any reference whatsoever to petitioner's claim of hazard or peril and danger to persons and property.

The second reason marked "B" on page 6 of the petition has no substance because as shown (*infra,* p. 15) *Blair* v. *Chicago,* 201 U. S. 400, merely held that where a franchise, limited as to duration, had been granted for the operation of a system and then a franchise was later granted for an extension of that system, which franchise for extension was not limited as to duration, the grantee of the franchise for the extension could not operate the extension beyond the time limited by the franchise covering the original system.

Furthermore, in *Blair* v. *Chicago* this Court expressly stated that it followed the ruling of the Illinois Supreme Court. If in this case, quite aside from *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, the ruling of the highest Court

of the State of New York is followed, then the fact that the New York Courts in this case have held respondents' franchises to be perpetual deprives petitioner of any ground for a writ.

As later shown (*infra*, p. 14), the ruling of the State Courts in this case is in accord with the applicable decisions of this Court.

The third reason, marked "C" on page 6 of the petition, has no substance because, as shown by the petition itself, *New Orleans Gas Light Company* v. *Drainage Commission*, 197 U. S. 453, merely had reference to the relocation of pipes laid in the street and is entirely inapplicable to this case.

The fourth reason, marked "D" on page 7 of the petition, has no substance because this Court in *City of Owensboro* v. *Cumberland Telephone and Telegraph Co.*, 230 U. S. 58, specifically cited *People* v. *O'Brien*, 111 N. Y. 1, and stated that such decision had been accepted and approved by this Court in *Detroit* v. *Detroit Citizens' Street Railway Company*, 184 U. S. 368, 395.

Furthermore, *People* v. *O'Brien* and the decision of the State Courts in this case are in entire accord with the applicable decisions of this Court which are cited (*infra*, pp. 14, 15).

The second paragraph on page 7 of the petition immediately following the paragraph marked "D", is but a repetition of the claim of *ultra vires* on the part of the City in the granting of respondents' franchises, and is purely a matter of local law and presents no Federal question whatsoever.

Summary of Argument.

I.

No Federal question was raised or decided in this action in the Courts of the State of New York and, there-

fore, there is no basis for invoking the jurisdiction of this Court under §237 of the Judicial Code.

II.

Even if the Courts below had decided a Federal question as claimed by petitioner herein, such determination was in accord with applicable decisions of this Court and, therefore, the claim of a Federal question is without substance.

III.

Answering Petitioner's Point I.

No question of due process is available to petitioner.

IV.

Answering Petitioner's Point II.

The construction of the franchises is a common law question for determination by the State Courts which cannot be presented to, or relied upon in, this Court on this application.

V.

Answering Petitioner's Point III.

The decision of the Supreme Court of the State of New York is in accord with the applicable decisions of this Court.

VI.

Conclusion.

ARGUMENT.

POINT I.

No Federal question was raised or decided in this action in the courts of the State of New York and, therefore, there is no basis for invoking the jurisdiction of this court under §237 of the Judicial Code.

The pleadings in the action assert no rights under the Constitution of the United States, and at no stage of the proceedings in this action in the Courts of the State of New York was any reference made to the Constitution of the United States.

It is well established by the decisions of this Court that it is essential to the jurisdiction of this Court, in reviewing a decision of a State Court, that it must appear affirmatively from the Record not only that a Federal question was presented to the highest court of the State having jurisdiction, or that its decision of the Federal question was necessary to the determination of the cause, but also that such Federal question was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. *New York*, 293 U. S. 52, 54.

The only claim by petitioner of a Constitutional question being in the Record is in the reference at the foot of page 9 of its brief to that part of the opinion of the Trial Court which states (R. 274):

> "Plaintiff's difficulty lies in the fact that the franchises in question are unlimited as to time or duration. Such franchises constitute property.

> When granted they cannot be taken away save by the terms therein prescribed or by due process of law. (*People* v. *O'Brien*, 111 N. Y. 1; *City of N. Y.* v. *N. Y. Central RR.*, 234 N. Y. 113; *N. Y. & Queens Electric Light & Power Co.* v. *City of N. Y.*, 221 App. Div. 544; *Coney Island, Fort Hamilton & Brooklyn RR.* v. *Kennedy*, 15 App. Div. 588; *Eighth Ave. Coach Corp'n* v. *City of N. Y.*, 170 Misc. 243.) Under the settled law of the state the defendant has a property right in its franchises, from the enjoyment of which it cannot be excluded without compensation. If public necessity requires its exclusion the result can be accomplished by purchase or by condemnation (*Coney Island, Fort Hamilton & B'klyn RR.* v. *Kennedy, supra*). • • • "

On the basis of the above language of the Court petitioner claims the question of due process was raised in this case and being sustained against petitioner can be availed of on this application.

The above statement by the Trial Court, however, does not afford petitioner a basis for claiming a Federal question on this application.

In the first place, even if petitioner could, on this application, rely on a claim of constitutional right made by respondent, nevertheless petitioner's claim on this application is not the converse of respondent's claim (referred to in the above quoted extract from the opinion of the Trial Court) in respect of due process.

Petitioner predicated this action upon the resolution of the Common Council, adopted March 6, 1939 (R. 39-42) which purported to terminate respondent's franchises (R. 8).

Such resolution is on its face predicated solely on petitioner's claim that, no dates of maturity being specified in any of respondent's franchises, such franchises can be terminated at will.

The reference to due process, however, was predicated on the franchises being perpetual whereas petitioner's claim that the resolution was effective was predicated on its claim that such franchises were terminable at will. In other words, petitioner was not claiming a right to terminate respondent's franchises if they were perpetual but, as its resolution shows, was claiming the right to terminate them because, no time or duration being specified, they were terminable at will.

For petitioner to now invoke the converse of due process in respect of or as applied to respondent, petitioner would have to admit that respondent's franchises are perpetual and this it does not do but, on the contrary, claims on this application that such franchises should be construed as terminable at will.

It follows, therefore, that no question concerning due process is now available to petitioner on this application.

The above also conclusively shows that petitioner's claim in the State Courts was solely concerning the construction of respondent's franchises, that is to say, whether a franchise granted without limitation as to time or duration is perpetual or terminable at will, and the State Courts construed the franchises as being perpetual.

The construction of a contract is a common law question to be determined under State law and, moreover, as shown (*infra*, pp. 14-15) the decision of the State Courts construing the franchises as being perpetual is in accord with the applicable decisions of this Court.

Thus petitioner, having predicated its right to terminate the franchises on the ground that, no time being specified, they were terminable at will, the decision in this case turns solely on the question of the determination of whether the franchises were perpetual and not on any claim of due process or Federal question.

In the second place, it is to be noted that the above quoted extract from the opinion of the Trial Court (R. 274) makes no reference to the Constitution of the United States.

The Constitution of the State of New York contains a due process provision (Art. 1, Sec. 6) and a provision against the taking of private property for public use without compensation (Art. 1, Sec. 7).

Where the State Constitution contains a due process clause an averment that contemplated action of a municipality would deprive a complainant of his property without due process of law without making reference to the Constitution of the United States, or asserting express rights thereunder, is referable to the State Constitution alone and affords no basis for invoking the jurisdiction of this Court under §237 of the Judicial Code.

Bowe v. *Scott*, 233 U. S. 658, 665.

See also:

Consolidated Turnpike Co. v. *Norfolk &c. Ry. Co.*, 228 U. S. 326, 331.

As we have hereinbefore pointed out, no mention of the United States Constitution was made at any stage of this case in the Courts below.

The decision of the Court of Appeals herein—the highest court of the State of New York—was rendered without opinion, and in the absence of an explicit statement by the Court of Appeals that its decision was based upon a Federal question, this Court has stated that it will not find that the decision of the Court of Appeals did not rest upon an adequate non-Federal ground.

McGoldrick v. *Gulf Oil Corporation*, 309 U. S. 2.

It follows therefore that inasmuch as the Record does not show that a Federal question was raised or decided herein in the State Courts below, there is no basis for invoking the jurisdiction of this Court under §237 of the Judicial Code.

POINT II.

Even if the courts below had decided a Federal question, as claimed by petitioner herein, such determination was in accord with applicable decisions of this court, and therefore the claim of a Federal question is without substance.

Even if Petitioner could assert a Federal question on this application, nevertheless the gravamen of this action is the construction of Respondent's franchises to be perpetual.

The Courts below, following applicable Court decisions of the State of New York, including, among others, *People* v. *O'Brien,* 111 N. Y. 1, determined that Respondent's franchises, containing no limitation as to time or duration of period of grant, were perpetual and constituted property which could not be taken away from the Respondent without due process of law including compensation.

This determination of the Courts below is in accord with applicable decisions of this Court, wherein this Court has held that franchises granted without limitation of time or duration of the grant are perpetual and cannot be terminated at will.

See

Louisville v. *Cumberland Telephone & Telegraph Company,* 224 U. S. 649;

City of Owensboro v. *Cumberland Telephone & Telegraph Company*, 230 U. S. 58;
Old Colony Trust Company v. *Omaha*, 230 U. S. 100;
Northern Ohio Traction & Light Co. v. *Ohio*, 245 U. S. 574;
Covington v. *South Covington & Cincinnati Street Railway Company*, 246 U. S. 413;
Ohio Public Service Company v. *Ohio, ex rel., Fritz*, 274 U. S. 12.

We have already answered the statement at page 7 of the petition that *People* v. *O'Brien*, 111 N. Y. 1, is not in accord with the applicable decisions of this Court (*supra*, p. 8).

Petitioner, overlooking the above applicable decisions of this Court, refers (p. 13 of its brief), to the cases of *Blair* v. *Chicago*, 201 U. S. 400, and *New Orleans Gas Light Company* v. *Drainage Commission*, 197 U. S. 453, as authority for its contention that the decision of the State Courts herein is not in accord with the applicable decisions of this Court.

The above cases are not applicable.

Blair v. *Chicago, supra*, is in no way contrary to the general principle laid down by this Court in the cases above referred to that franchises granted without limitation as to time are perpetual.

In the first place, this Court in the *Blair* case held the franchise in question was not in perpetuity because such franchise was for an extension of an old system which was being operated under a franchise for a limited term and, therefore, it could not have been intended that the franchise in question (viz., the franchise for an extension) which was without a stated term was to extend beyond the stated term of the old system to which such franchise was an extension.

In the second place, this Court in the *Blair* case stated that it was willing to accept the Illinois holding.

New Orleans Gas Light Company v. *Drainage Commission, supra,* has no application to the question involved herein because in such case there was no attempt to take away the right of the Company to maintain its pipes and conduits in the streets, but merely the enforcement of a regulation which changed the location of such pipes and conduits in the streets.

It is clear therefore that the holding by the Courts below herein that Respondent's franchises, granted without limitation of time or duration of period of grant, were perpetual and could not be terminated at will, is in accord with the applicable decisions of this Court.

It follows, therefore, that Petitioner's claim that there is a Federal question which should be reviewed by this Court is devoid of any substantial foundation or merit, and furnishes no basis for an application for a writ of certiorari.

Consolidated Turnpike Company v. *Norfolk &c. Ry. Company,* 228 U. S. 596, 600;
Equitable Life Assurance Society v. *Brown,* 187 U. S. 308, 311, 314.

POINT III.

Answering Petitioner's Point I.

No Question of Due Process Is Available to Petitioner.

The resolution purporting to terminate respondent's franchises is on its face predicated solely on petitioner's claim that, no dates of maturity being specified in any of

respondent's franchises, such franchises can be terminated at will (R. 40).

Thus, by the express terms of such resolution, its effectiveness depended entirely on the construction of the franchises—a common law question—and the State Courts having construed such franchises to be perpetual no question of due process is available.

In other words, the reference in the opinion of the Trial Court to due process (R. 274) was predicated on the franchises being perpetual whereas petitioner claims that such franchises were terminable at will and predicated the effectiveness of the resolution of termination on that premise.

For petitioner to now invoke the converse of due process in respect of or as applied to respondent, petitioner would have to admit that respondent's franchises are perpetual and this it does not do, but comes into Court claiming that such franchises should be construed as terminable at will.

At page 10 petitioner makes the argument that the decision of the Supreme Court of the State of New York that the franchises are perpetual, has deprived petitioner of its property without due process of law. If such statement can be said to present a Federal question then a conclusive answer thereto is that no such question was presented in the Courts below and, therefore, cannot be made the basis of an application for a writ of certiorari.

Nor is there any merit whatsoever in petitioner's argument that it has been denied due process by the decision of the State Supreme Court that respondent's franchises are perpetual. Petitioner instituted this action in the State Court to determine the rights of the parties with respect to such franchises and has, therefore, had its day in Court, and the rights of the parties have, pursuant to the prayer of petitioner, been determined.

The contention that such decision is erroneous does not in and of itself present a Federal question under the due process clause of the Constitution.

Tracy v. *Ginzberg*, 205 U. S. 170;
Bonner v. *Gorman*, 213 U. S. 86;
American Railway Express Company v. *Kentucky*, 273 U. S. 269, 273;
Bell Telephone Company of Pennsylvania v. *Pennsylvania Public Utility Commission*, 309 U. S. 30, 32.

At page 10 of petitioner's brief to this Court the statement is made that the petitioner offered to respondent an opportunity to provide a modern method of transportation and that respondent refused such offer. While such statement has no bearing upon the application now before this Court we point out that there is nothing in the Record to justify the statement of the petitioner last above referred to, and the statement is incorrect.

POINT IV.

Answering Petitioner's Point II.

The Construction of the Franchises Is a Common Law Question for Determination by the State Court Which Cannot Be Presented to, or Relied Upon in, This Court on This Application.

POINT V.

Answering Petitioner's Point III.

The Decision of the Supreme Court of the State of New York Is in Accord With the Applicable Decisions of This Court.

This has been fully shown in Point II, *supra.*

CONCLUSION.

The Petition Should Be Denied.

Dated, September 14, 1942.

Respectfully submitted,

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